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Nos. 01-950, 01-1018

Supreme Court, U.S.
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In The
Supreme Court of the United States

HILLSIDE DAIRY, *et al.*,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, *et al.*,

Respondents.

PONDEROSA DAIRY, *et al.*,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether 7 U.S.C. § 7254 exempts provisions of California's milk pricing and pooling regulations from scrutiny under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3.

2. Whether the Petitioners state a claim under the Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, when California's milk pricing and pooling regulations do not discriminate on their face based on state citizenship or residence.

LIST OF PARTIES

Petitioners in Case No. 01-950 are Hillside Dairy, A&A Dairy, L&S Dairy, and Milky Way Farms.

Petitioners in Case No. 01-1018 are Ponderosa Dairy, Pahrump Dairy, Rockview Dairies, Inc., and Darrel Kuiper and Diane Kuiper, d/b/a D. Kuiper Dairy.

Respondents in both cases are William J. Lyons, Jr., Secretary, Department of Food & Agriculture, State of California, and Robert Tad Bell, Undersecretary, Department of Food & Agriculture, State of California.

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STATEMENT

In *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999), the Court of Appeals for the Ninth Circuit unanimously held that 7 U.S.C. § 7254 (Section 7254) exempted California milk composition standards and provisions of its milk pricing and pooling laws from application of the dormant Commerce Clause. Building upon that decision, the court of appeals held that the 1997 pooling plan amendments, and other provisions of California's milk pricing and pooling laws challenged by Petitioners, were exempt from dormant Commerce Clause review. The court of appeals also upheld the district court's dismissal of Petitioners' Privileges and Immunities Clause claims. The court of appeals decision on these two issues is before the Court.[1]

A. California's Milk Laws

California has its own laws establishing the minimum prices paid by California processors for milk produced within the state and the minimum prices received by producers for that milk. California also has its own minimum standards for the composition of fluid milk sold within the state. These laws provide California consumers with an adequate and continuous supply of the most nutritious milk in the country at affordable prices.

[1] The part of the court of appeals' decision upholding dismissal of the Petitioners' Equal Protection Clause claim is not before the Court.

Both federal and California milk pricing laws were spawned during the Great Depression. The drop in commodity prices during the Depression destroyed the market stability that had previously existed. *Zuber v. Allen*, 396 U.S. 168, 173-74 (1969). Federal milk pricing laws were enacted in the face of an incipient rebellion by dairy farmers. *Queensboro Farms Products v. Wickard*, 137 F.2d 969, 974 (2d Cir. 1943). California initially attempted to participate in the federal system. The Ninth Circuit thwarted that effort when it held that the federal milk law did not cover milk that was produced and consumed within the state. *Berdie v. Kurtz*, 75 F.2d 898, 905 (9th Cir. 1935). Less than two months after that decision became final, California enacted its own milk pricing laws. 1935 Cal. Stat., ch. 241, at 922-29, §§ 735-737.9 (current version at California Food & Agric. Code §§ 61801-62403).

Under these laws, the California Department of Food and Agriculture (Department) establishes minimum prices to be paid for milk produced and processed within California, based on the type of product processed from the milk. The Class 1 price, which covers processed fluid milk, is typically the highest minimum price. Raw milk processed into butter (Class 4a) or cheese (Class 4b) typically has the lowest minimum price. California law does not prohibit processors from paying producers more than the minimum price. Nor does California law mandate any minimum prices for milk produced outside of California.

California courts have repeatedly stated that the primary purpose of the milk pricing laws is to provide "an adequate and continuous supply of pure, fresh, wholesome fluid milk to the consumers at fair and reasonable prices." *Golden Cheese Co. v. Voss*, 230 Cal. App. 3d 547, 553 (1991). Thus, the milk pricing laws "primarily protect the

consumer, not milk producers, by protecting the quality and quantity of the milk they drink." *Id.* at 562. These judicial pronouncements are consistent with the legislative declaration that economic disruption from the absence of pricing regulation "may tend to undermine sanitary regulations and standards of content and purity" for fluid milk, Cal. Food & Agric. Code § 61802(c) (West 1997), and consistent with the factors that the Department must consider in setting minimum milk prices. Cal. Food & Agric. Code § 62062(b).

Raw milk is composed of fat, solids-not-fat, and water.[2] In 1947, California first adopted a comprehensive set of minimum composition standards for fluid milk, which specified minimum percentages of fat and solids-not-fat, and other dairy products. 1947 Cal. Stats, Ch. 939, at 2168, § 460. In 1961, the California Legislature enacted a minimum composition standard for two-percent milk (now called "reduced fat" and set forth in California Food and Agricultural Code section 38211) that could consistently be satisfied only through "fortification," the addition of solids-not-fat to the milk as it is being processed. 1961 Cal. Stats., Ch. 2126, at 4386, § 626.1. Later, a minimum standard for one-percent milk was added, which could also require fortification. Cal. Food & Agric. Code § 38191. Less stringent federal standards for these products, which apply in the rest of the United States, can ordinarily be satisfied without fortification.

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[2] Solids-not-fat are milk solids, other than fat, that include protein, calcium, lactose and other nutrients.

The adoption of composition standards that required milk fortification had a direct effect on the milk pricing laws. Prior to 1961, minimum milk prices were not separately set for fat and solids-not-fat. Fortification established, for the first time, an economic value for the level of solids-not-fat in raw milk. As a consequence, the Legislature required that the new two-percent milk composition standard could not take effect until minimum Class 1 prices had a separate solids-not-fat basis component. 1961 Cal. Stats., Ch. 2126, at 4386, § 626.1. In 1963, component Class 1 pricing and the two-percent milk standard became permanent, and a higher solids-not-fat standard for whole milk, which also required fortification, was adopted. 1963 Cal. Stats., Ch. 469, at 1322-25, §§ 460, 626.1, 4231, 4283.

Composition standards requiring fortification were not the only significant change in California milk laws in the 1960s. California law originally provided that producers would receive a minimum price for milk based on its end use. Raw milk sold to fluid milk (Class 1) processors received the higher Class 1 minimum price; milk sold to manufacture cheese (Class 4) received the lower Class 4 minimum price. Thus, a milk producer's revenues were directly related to the amount of milk that was sold for Class 1 usage. Steven E. Hopkinson, Comment, *State Regulation of Milk Producer Pricing and Sales in California*, 11 U.C. Davis L. Rev. 491, 494 (1978).

This system proved unworkable. There was fierce competition among processors for the more lucrative Class 1 contracts, which led to numerous abuses that undercut the minimum pricing system. *Id.* Some Class 1 processors began acquiring their own dairy herds, which reduced their need to purchase milk from independent producers and provided these processors with a competitive advantage over

other processors. *Hillside* Dkt. No. 151, Ex. A to Lombardo Decl., L.J. Butler, *Maintaining the Competitive Edge in California's Dairy Industry, Part I-Organization and Structure* (Butler), at 29. The Gonsalves Milk Pooling Act, Cal. Food & Agric. Code §§ 62700-62731, was enacted in 1967 to avoid these problems and preserve the viability of the minimum pricing system.

Under the pooling system, the minimum price that producers receive is either a higher quota price or a lower overbase price.[3] The amount of quota was originally set at 110% of a producer's sales to Class 1 plants at the time of the adoption of the Gonsalves Milk Pooling Act. *Butler, supra*, at 29. The establishment of quota on this basis ensured that producers who had contracts for the sale of raw milk to Class 1 plants would not suffer economic harm from implementation of pooling. The amount of quota milk is still restricted, currently accounting for approximately 27% of total California milk production. State of California Department of Food and Agriculture, Milk Pooling Branch Report 120-17 at 41 (Jan. 24, 2003) (attached as App. B to Brief for United Western Dairymen as Amicus Curiae). Thus, most California milk receives the overbase price.

California has an elaborate accounting system for integrating the minimum prices that processors are required to pay for milk, and the minimum prices that producers are entitled to receive for milk. Each month, a

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[3] The difference between the quota and overbase price is fixed; the spread is currently calculated to be $1.70 per hundredweight for milk containing 8.7% solids-not-fat. *Pooling Plan for Market Milk As Amended* (July 1, 1997) § 906, Joint Appendix 52-53; *see also* <http://www.cdfa.ca.gov/mkt/mp/poolplan_09-01.pdf> (current version).

processor is charged an "in-plant blend price" based on the percentage and minimum price of each end use to which the milk was processed. The in-plant blend price is multiplied by the total volume of raw milk processed to yield the processor's "gross pool obligation." Cal. Food & Agric. Code § 62079; *Pooling Plan for Market Milk As Amended* (July 1, 1997) (Pooling Plan) §§ 900-901, Joint Appendix (J.A.) 46-48; *see also* <http://www.cdfa.ca.gov/mkt/mp/poolplan_09-01.pdf> (current version).

Processors must pay their California producers at least the minimum quota or overbase prices. The processors receive a credit against their gross pool obligation equal to their total required minimum payments to California producers. If a processor's gross pool obligation exceeds the credit, as typically occurs with Class 1 processors, the processor pays the difference into the pool. If the gross pool obligation is less than the credit, as typically occurs with cheese processors, the processor receives a payment from the pool. Each month, total payments into the pool balance payments out of the pool. Pooling Plan §§ 1000-1004, J.A. 55-60.

California does not restrict processors from purchasing milk from outside the state. Nonetheless, the receipt of that milk is accounted for in calculating a processor's pool obligations. Before 1997, the pool obligation credit that California processors received for out-of-state milk was calculated by multiplying the total volume of such milk by the in-plant blend price. A change in this accounting procedure spawned this litigation.

B. This Litigation

As long as the quota price and Class 1 price were roughly equivalent, the use of the in-plant blend price to calculate the pool credit for out-of-state milk did not create any economic or fairness concerns. In the mid-1990s, however, Class 1 prices were significantly greater than quota prices. Court of Appeals, Excerpts of Record (C.A. E.R.) Tab 11Q at 9. This price disparity provided California processors with a significantly larger accounting credit against their pool obligations for out-of-state milk (the Class 1 price) than they received from purchasing in-state milk (the quota or overbase price). Moreover, if the actual price of the out-of-state milk was less than the processors' in-plant blend price, the processor could retain the price difference and still pay the out-of-state producer more than the quota price. Thus, the pool accounting for out-of-state milk put California producers at a significant, artificial disadvantage in relation to out-of-state producers.

The development of a practice called "roundtripping" was the most economically inefficient result of the method used to account for out-of-state milk. Some California producers and cooperatives would ship their California overbase milk to out-of-state processing plants. They would then ship the same amount of milk to California fluid milk processors from out-of-state dairies and receive the higher California Class 1 price. Court of Appeals, Supplemental Excerpts of Record (C.A. S.E.R.) Tabs 2C, 2I. This price was much higher than the overbase price that they would have received if they had sold their California production directly to California processors. C.A. E.R. Tab 11Q at 47-49; C.A. S.E.R. Tabs 2C, 2I. For example, one California cooperative generated $100,000

per month in additional revenues through roundtripping. C.A. S.E.R. Tab 2I. Some dairy farmers even opened new dairies out-of-state, in addition to their in-state dairies, to take advantage of this accounting method. C.A. S.E.R. Tab 2B.

In September 1996, California milk producers submitted a petition to the Department proposing changes to the milk pooling plan to eliminate the incentive to purchase out-of-state milk. The Department held extensive hearings on this and other proposals offered by organizations representing California milk processors and out-of-state milk producers. Based on those hearings, the Department determined that its accounting method for out-of-state milk "ha[d] caused dramatic increases in the inefficient movement of milk and ha[d] altered the sound, orderly marketing practices of milk, all as a result of regulatory provisions and not competitive market conditions." C.A. E.R. Tab 11Q at 48. The Department modified the California producers' proposal and adopted the pooling plan amendments that are the subject of this case. In taking this action, the Department determined that the amendments were "the best, most equitable and least restrictive means reasonably available to treat in-state and out-of-state milk evenhandedly for purposes of pool accounting. . . ." *Id.* at 50-51.

The amendments provide that California processors must use the lesser of the in-plant blend price, or the quota price in calculating their credit for out-of-state milk. Under typical market conditions, the in-plant blend price for Class 1 processors exceeds the quota price, so the quota price would be used to calculate their credit for out-of-state milk. The pooling plan amendments also provide that the credit price for out-of-state milk would never be lower than the overbase

price. Pooling Plan § 900(d), J.A. 47-48. Thus, the credit price for out-of-state milk is at least equal to, and usually greater than, the credit price for in-state milk.

The pooling plan amendments do not establish any minimum price that a California processor is required to pay for out-of-state milk. Thus, a more efficient out-of-state producer is able to compete successfully against a less efficient California producer. In addition, since the credit for out-of-state milk is based on the quota price, a California Class 1 processor suffers no economic loss for payments for out-of-state milk up to that price. In adopting the 1997 pooling plan amendments, the Department described its objective: "Competitive market conditions should determine the movement of milk, not inappropriate regulatory pool provisions which otherwise distort the economic signals of the marketplace."[4] C.A. E.R. Tab 11Q at 49.

Northern Nevada dairies (Petitioner Hillside Dairy, et al.) and southern Nevada and Arizona dairies (Ponderosa Dairy, et al.) filed a lawsuit in the United States District Court for the Eastern District of California primarily seeking to prevent the 1997 pooling plan amendments from taking effect. They moved for a preliminary injunction, largely based on their contention that the amendments violated the Commerce Clause. The district court denied the

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[4] The Petitioners and Amici have claimed that the Department's intent was "economic protectionism" for California milk producers. If that had been the intent, which it was not, the Department utterly failed. Use of out-of-state milk in California has doubled since the adoption of the 1997 pooling plan amendments. C.A. S.E.R. Tab 2N; California Department of Food and Agriculture, *Net Milk Available in California*, California Dairy Information Bulletin (Feb. 2003), at 10, Table 4B <http://www.cdfa.ca.gov/dairy/pubs/DIB/dib.pdf>.

motion to enjoin the amendments, stating that the Petitioners had "fail[ed] to carry their burden of demonstrating that they will prevail on the merits of their Commerce Clause challenge to the pooling amendments." C.A. E.R. Tab 6 at 6:17-18; *see also* C.A. E.R. Tab 7 at 2:1-4, 2:21-3:23.[5]

The district court responded directly to Petitioners' claims that the pooling plan amendments were unfair to out-of-state producers:

> Plaintiffs also argue the amendment violates the Commerce Clause because it was enacted with the intent of reducing the amount of out-of-state milk purchased by California processors. However, they cite no authority for the proposition that the Commerce Clause prevents a state from remedying a regulatory advantage to out-of-state producers. "A fair reading of the [regulatory history] indicates no more than that the [amendment] was aimed at protecting [California's] milk industry from itself, not from outside competition."

C.A. E.R. Tab 6 at 5:22-6:5.[6]

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[5] Although it is not an issue before this Court, Petitioners deal at length with their underlying Commerce Clause claim. Brief for Petitioners 34-42. To support that argument, they append a California Legislative Counsel's opinion to their brief. This opinion was based on the incorrect assumptions that California's minimum prices are applied to out-of-state milk, and that out-of-state milk was used to fund transportation allowances for in-state milk production. C.A. E.R. Tab 11Q at 50. The district court considered and rejected the Legislative Counsel's opinion and the Petitioners' dormant Commerce Clause claim in ruling upon the Petitioners' preliminary injunction motion.

[6] The district court's decision enjoined enforcement of California Food and Agricultural Code sections 62077 and 62078 against out-of-state producers. C.A. E.R. Tab 7 at 5. California has not interpreted these

(Continued on following page)

In July 1998, the district court granted Respondents' motion to dismiss certain causes of action under Rule 12(b)(6), including claims under the Equal Protection Clause and the Privileges and Immunities Clause. In 1999, the district court granted Respondents' motion for summary judgment on the remaining dormant Commerce Clause claims. The district court relied upon the holding in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998) that 7 U.S.C. § 7254 exempted California's milk pricing and pooling laws from application of the dormant Commerce Clause. On appeal, the court of appeals upheld the district court's determinations on these issues.

SUMMARY OF ARGUMENT

The first question before the Court is whether 7 U.S.C. § 7254 exempts provisions of California's milk pricing and pooling regulations from scrutiny under the dormant Commerce Clause. Clear congressional intent, rather than any prescribed set of words, is required for the creation of an exemption from dormant Commerce Clause scrutiny. Drawing upon cases involving congressional limits on state sovereignty, Petitioners argue that the congressional intent must be both unequivocal and textual. Principles of federalism support a more state-deferential standard for determining the existence and scope of a dormant Commerce Clause exemption.

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provisions as setting minimum prices outside of California. C.A. E.R. Tab 7 at 5 n.4.

Petitioners imply that Section 7254 only protects California milk laws from federal preemption. But the broad text of Section 7254 covers more than preemption. It also covers any provision of law that "preempt[s], prohibit[s] or otherwise limit[s] the authority of the State of California . . . regarding" milk content and labeling. 7 U.S.C. § 7254. Its sweeping language is similar in breadth and specificity to the language of other laws that have been found to create a dormant Commerce Clause exemption.

The legislative history of Section 7254 also shows an unambiguous intent to exempt California milk laws from the dormant Commerce Clause. In enacting Section 7254, Congress allowed California to regulate the content of milk in interstate commerce so that California could fully enforce its fluid milk standards. Without a Commerce Clause exemption, that intent could be frustrated.

Once it has been determined that Section 7254 provides an exemption from the dormant Commerce Clause, it is necessary to determine the scope of that exemption. Section 7254 expressly protects California's authority "directly or indirectly to establish or continue to effect any law, regulation or requirement regarding" fluid milk content and labeling. Based on this language, provisions of the milk pricing and pooling laws that relate to fluid milk content are exempt from dormant Commerce Clause review.

California pricing and pooling laws have a close historical, economic, and legal connection to fluid milk composition. When California first required fortification of fluid milk (the most significant difference from federal composition requirements), it had to change its pricing

system for milk processed into fluid milk. California's ability to control raw milk costs through minimum prices helps ensure that consumers receive the benefits of California's higher milk composition standards at reasonable costs. California courts and the legislature have long recognized that the primary purpose of the milk pricing laws is to provide an adequate supply of wholesome fluid milk to consumers at a fair price.

California's milk pooling laws are an essential part of the milk pricing system. Legislative declarations that accompanied the original adoption of the milk pooling laws recognized the relationship among pooling, pricing and milk content. The 1997 pooling plan amendments at issue in this case were necessary to remedy abuses that were undermining the efficient operation of the pricing and pooling system. With these amendments, California's milk pricing and pooling laws continue to ensure an adequate supply of fluid milk that satisfies state content standards.

An exemption from dormant Commerce Clause review for pricing and pooling laws will not result in the unfair regulation of out-of-state milk producers. Congress retains its Commerce Clause power to eliminate the exemption in Section 7254 if necessary to end any abusive action by California. In addition, the competing economic interests of California producers and California processors help ensure that California's milk pricing and pooling laws will not be unfair to out-of-state producers.

The second question before the Court is whether a claim can be stated under the Privileges and Immunities Clause when the laws in question do not discriminate on their face based on state citizenship or residence. It is well established that the Privileges and Immunities Clause is

violated only if a state law discriminates against nonresidents, depriving them of a protected privilege that is accorded to residents. Recognizing that the California milk pooling laws do not discriminate based on residency, Petitioners argue that the Court should use a "practical effects" test derived from dormant Commerce Clause cases as part of its Privileges and Immunities Clause analysis. This argument depends heavily upon an infrequently cited 1919 decision, *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522 (1919). Contrary to Petitioners' position, *Chalker* has never given rise to a "practical effects" test under the Privileges and Immunities Clause. The Commerce and Privileges and Immunities Clauses also have different objectives and set different standards for state conduct. Use of the same test for both Clauses is improper.

The Solicitor General suggests that the Court might consider drawing upon its Equal Protection Clause decisions to find that a facially neutral state law that has a discriminatory intent could violate the Privileges and Immunities Clause. Many of the laws challenged under the Equal Protection Clause are facially neutral, and the invidious nature of the law, as applied to a suspect classification, is only apparent through its effect. The Privileges and Immunities Clause does not address laws that have a disparate effect on nonresidents. Adoption of the Solicitor General's suggestion would improperly require a stringent Equal Protection Clause review indirectly through the Privilege and Immunities Clause. In any event, the state pooling laws at issue in this case do not have a discriminatory intent.

ARGUMENT

I. SECTION 7254 EXEMPTS CALIFORNIA LAWS AND REGULATIONS REGARDING FLUID MILK CONTENT FROM APPLICATION OF THE DORMANT COMMERCE CLAUSE

Shamrock Farms Co. v. Veneman, 146 F.3d 1177 (9th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999), held that 7 U.S.C. § 7254 exempted California milk composition standards and provisions of its milk pricing and pooling laws from application of the dormant Commerce Clause. Not only are Petitioners challenging the extension of that holding to the 1997 pooling plan amendments at issue in this case, they argue that Section 7254 does not provide a Commerce Clause exemption for any California law. This argument is contrary to previous holdings of the Court regarding congressional intent to exempt state laws from the dormant Commerce Clause. It is also contrary to the wording of Section 7254 and the clear congressional intent that California have its own laws regarding the content of fluid milk.

Article I, Section 8, of the Constitution grants Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The Court has long held that "while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). This implied judicial limitation on the power of States has come to be known as "the dormant Commerce Clause."

Under the Commerce Clause, "Congress has undoubted power to redefine the distribution of power over

interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce." *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945) (citations omitted). State actions that Congress has plainly authorized are invulnerable to dormant Commerce Clause challenge. *Northeast Bancorp, Inc. v. Board of Governors, FRS*, 472 U.S. 159, 174 (1985).

A. Clear Congressional Intent is Needed To Create an Exemption from the Dormant Commerce Clause

In determining that Section 7254 provided a dormant Commerce Clause exemption, the court of appeals stated that such congressional action must be "unmistakably clear." *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177, 1180 (9th Cir. 1998). This phrase, which was originally used in the dormant Commerce Clause context in *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984), is one of several similar phrases that the Court has used in deciding whether Congress has exempted state action from dormant Commerce Clause review. In *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982), the Court stated that the "Congressional intent and policy . . . must be expressly stated." *Maine v. Taylor*, 477 U.S. 131, 139 (1986) required "an unambiguous indication of Congressional intent." The basic thrust of each of these statements is clear congressional intent, not the use of any particular "talismanic" form of words. *South-Central Timber*, 467 U.S. at 91.

In contrast, Petitioners want a more stringent standard. They claim that there must be a "clear statement"

that is "both unequivocal and textual" for a congressional dormant Commerce Clause exemption. Brief for Petitioners (Pet. Br.) at 15-16, 25. They derive this standard from a line of decisions involving state sovereignty, primarily *Dellmuth v. Muth*, 491 U.S. 223 (1989) and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), that have never been applied to a dormant Commerce Clause exemption.

In *Dellmuth*, the issue was whether Congress, in enacting the Education of the Handicapped Act, intended to abrogate state sovereign immunity under the Eleventh Amendment. As the Court pointed out, abrogation of sovereign immunity upsets the balance between the Federal Government and the States, and strains basic principles of federalism. In that context, a clear statement of congressional intent in the text of the statute is required. *Dellmuth*, 491 U.S. at 227-28. Similar concerns about state sovereignty in the federalist system in the context of congressional action under the Supremacy Clause led to the use of a "clear statement" standard in *Gregory*, 501 U.S. at 460-61.

The *Dellmuth* and *Gregory* decisions are part of a larger recognition by the Court of the importance of state sovereignty in the federalist system. In *Printz v. United States*, 521 U.S. 898 (1997), the Court held that the federal government could not compel states to implement federal regulatory programs. The court stated: "It is incontestable that the Constitution established a system of 'dual sovereignty.' Although States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Id.* at 918-19 (citations omitted). Similar federalism concerns have led the Court to limit the scope of congressional Commerce Clause powers. *United States v. Morrison*, 529 U.S. 598, 607-08 (2000).

These same principles of federalism and state sovereignty suggest a more state-deferential standard for determining the existence and scope of a congressional exemption from dormant Commerce Clause review. The dormant Commerce Clause is a limitation on a state's exercise of its sovereignty and tends to undermine the balance struck in the federalist system. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 611-12 (1997) (Thomas, J., dissenting). When a federal court invalidates a state law under the dormant Commerce Clause, a principal advantage of federalism, state experimentation in a subject area, may be lost. Martin Redish & Shane Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L.J. 569, 598.

Congress retains the power under the Commerce Clause to correct any perceived abuse of state sovereignty. An appropriate reconciliation of Congress's Commerce Clause powers, the dormant Commerce Clause, and state sovereignty may be to construe any lack of clarity in a congressional dormant Commerce Clause exemption in deference to the preservation of state law and authority.

B. The Text of Section 7254 Shows an Unambiguous Intent to Exempt California's Milk Laws from the Dormant Commerce Clause

Section 7254 states:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding

(1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or

(2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

Petitioners and the Solicitor General assert that the use of the phrase "shall be construed" suggests Section 7254 only refers to non-constitutional sources of federal law. Pet. Br. 24-25; Brief for United States as Amicus Curiae (U.S. Br.) 13.[7] The Solicitor General also argues that if Congress intended a Commerce Clause exemption it should "have referred more specifically to that Clause." U.S. Br. 13-14. The Solicitor General supports this claim with examples of federal laws, unrelated to the dormant Commerce Clause or State authority, that use both the word "Constitution" and the words "laws of the United States." *Id.* at 12 n.3. Implicit in these arguments is that Section 7254 only protects California's laws regarding milk composition and labeling from federal preemption.

The text of Section 7254 expressly refers to preemption. But it also states that no law "shall be construed to . . . *prohibit, or otherwise limit* the authority of the State of California. . . ." 7 U.S.C. § 7254 (emphasis added). The Petitioners and Solicitor General ignore this broad language,

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[7] The Solicitor General cites *City of Boerne v. Flores*, 521 U.S. 507 (1997) and implies that Congress, if it intended Section 7254 to be a dormant Commerce Clause exemption, might be improperly constraining judicial authority to "construe the Constitution." U.S. Br. 13. It is well established, however, that Congress, not the courts, have primacy in implementing the Commerce Clause. "Courts are final arbiters under the Commerce Clause only when Congress has not acted." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1982).

and thereby treat it as surplusage. In contrast, the Ninth Circuit in *Shamrock Farms Co.* properly understood its significance:

> We note also that the protection the Farm Bill [Section 7254] affords California's milk standards is sweeping. It does not simply bar preemption. Rather, it states that no provision of law shall "preempt, prohibit, or otherwise limit" California's milk laws or regulations. The breadth of the Farm Bill's protection for California's milk standards fortifies our view that by using the term "any other provision of law," Congress intended to preserve those standards from any sort of challenge, including one based on Commerce Clause grounds.

Shamrock Farms Co. v. Veneman, 146 F.3d 1177, 1181 (9th Cir. 1998).

The language of Section 7254 is similar in breadth or specificity to the language of the statutes and regulations that have previously been relied upon by the Court in finding a dormant Commerce Clause exemption. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946), *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653 (1981) (McCarran-Ferguson Act and insurance industry); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213-15 (1983) (Housing and Urban Development Act and municipal order requiring use of local workers); *Northeast Bancorp v. Board of Governors, FRS*, 472 U.S. 159, 174 (1985) (Bank Holding Company Act and

interstate acquisitions of banks).[8] Significantly, none of those statutes and regulations explicitly references either the Commerce Clause or the Constitution. Rather, the language at issue in each of those cases variously authorized the state to engage in regulatory conduct affecting interstate commerce. Similarly, the language of Section 7254 allows California, without prohibition or limitation, to enact laws regarding the content and labeling of fluid milk.

C. The Legislative History of Section 7254 Also Shows an Unambiguous Intent to Exempt California's Milk Laws from the Dormant Commerce Clause

The legislative history of Section 7254 further demonstrates that Congress intended to allow California to enforce laws regarding milk content even if those laws affect interstate commerce. Simply stated, it would have been pointless for Congress to have enacted Section 7254 without including a dormant Commerce Clause exemption.

When Section 7254 was adopted, the federal Nutrition Labeling and Education Act of 1990 (NLEA) Pub. L. No. 101-535, 104 Stat. 2353, prohibited a state from having

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[8] The Court in *White* primarily relied on the market participant exception to the dormant Commerce Clause to uphold the Mayor's order requiring use of the local work force in public improvement projects. *White*, 460 U.S. at 214-15. The Court indicated that projects paid for with a mix of federal and local funds were "affirmatively sanctioned" by the federal government by virtue of federal regulations which, like the mayoral order, imposed local-workforce requirements. *White*, 460 U.S. at 215.

any composition or labeling standard for any food, including fluid milk, in interstate commerce that was not identical with any existing federal standard for the same product. 21 U.S.C. § 343-1(a)(1)-343-1(a)(2). This prohibition did not apply to intrastate products. NLEA, 58 Fed. Reg. 2462 (Jan. 6, 1993). Thus, NLEA only preempted California's more stringent standards for fluid milk that was processed outside of California. Most fluid milk sold at retail in California is processed within the state, and had to satisfy the California standards.

Section 7254 was Congress's response to NLEA. Having initially exercised its Commerce Clause power to limit the authority of California to affect interstate commerce, Congress acted to allow California, directly or indirectly, to regulate fluid milk content and labeling in interstate commerce. A dormant Commerce Clause challenge to California laws regarding fluid milk content would be fundamentally inconsistent with congressional authorization of these laws.

The House Conference Committee Report that accompanied adoption of Section 7254 unambiguously states Congress's intent:

> The Managers intend for the State of California to be able to fully enforce and apply its fluid milk standards and their attendant labeling requirements to all fluid milk sold at retail or marketed in the State of California. . . .

H.R. Conf. Rep. No. 104-494, at 338-39 (1996), *reprinted in* 1996 U.S.C.C.A.N. 683, 701. Petitioners' brief contains similar statements from individual members of Congress describing their interest in allowing "California to keep its existing standards if they see fit to do so." Pet. Br. 32

(Representative Solomon); *id.* (Representative Thomas); *id.* at 28-29 (Representative Thomas).

Congress thus intended that California's standards apply fully to fluid milk sold in California regardless of its source. Less stringent federal standards would apply in the rest of the United States. This comprehensive regulatory system, adopted under Congress's Commerce Clause powers, would be undermined if California's laws regarding milk composition were subject to dormant Commerce Clause challenge. The only reasonable reading, then, of Section 7254 is one that includes an exemption from dormant Commerce Clause scrutiny.

II. THE PROVISIONS OF THE CALIFORNIA MILK PRICING AND POOLING LAWS INVOLVED IN THIS CASE ARE WITHIN THE SCOPE OF SECTION 7254

A. Section 7254 is Broadly Worded to Exempt All Laws Relating to Milk Content from Dormant Commerce Clause Challenge

Having determined that Section 7254 provides an exemption from dormant Commerce Clause review, it is necessary to determine the scope of that exemption. Section 7254 indisputably covers the specific sections of the California Food and Agricultural Code that set minimum fat and solids-not-fat content requirements for fluid milk products sold or marketed in California and that require labeling in conformity with those standards. The statutory language of Section 7254 determines the extent to which the dormant Commerce Clause exemption extends beyond those provisions. As discussed above, the

Court, in interpreting that language, should give due deference to the preservation of state law and authority.

The language in Section 7254 is very broad. It expressly protects California's authority, "directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding" fluid milk product content and labeling. Section 7254 covers not only laws that existed when that section was adopted, but new laws as well, whether established directly or indirectly. Indeed, the phrase "directly or indirectly" in Section 7254 is so general that it alone could be interpreted to cover all of California's milk regulatory programs.

The only possible limitation to the scope of Section 7254 is that the laws and regulations must regard or relate to fluid milk composition or labeling. In considering this limitation, the Court should accord significant weight to California's own determination of what law supports its unique fluid milk content standards. In this case, the history of their enactment, basic economic principles and California judicial and legislative pronouncements all show a close connection between milk pricing and pooling laws and fluid milk content, which brings the provisions of these laws within the scope of Section 7254.

B. Because of Their Relationship to Fluid Milk Content, Provisions of California Milk Pricing and Pooling Laws Are Laws Regarding the Content and Labeling of Fluid Milk

1. The Historic Relationship Between Milk Pricing and Fluid Milk Content

The most significant change in California's milk composition standards, the fortification of fluid milk,

resulted in a significant change in California's milk pricing system. When California first required fortification in 1961, there were no separate minimum milk prices for solids-not-fat. The fortification requirement established an economic value for the level of solids-not-fat in raw milk that had not previously existed. As a consequence, the California Legislature required that the new two-percent (low-fat, now reduced-fat) milk composition standard could not take effect until minimum Class 1 prices included a separate solids-not-fat basis component. 1961 Cal. Stats., Ch. 2126 at 4386, § 626.1. In 1963, component Class 1 pricing and the two-percent milk standard became permanent and a higher solids-not-fat standard for whole milk was adopted. 1963 Cal.Stats., Ch. 469 at 1322-25, §§ 460, 626.1, 4231, 4283.

In the mid-1980s, the federal government considered whether to adopt California's milk composition standards on a nationwide basis. At that time, federal milk pricing orders did not include a separate Class 1 price for solids-not-fat. Economic Research Service, USDA, *Nationwide Adoption of the California Solids Standards for Fluid Milk Products*, Staff Rep. No. AGES840816 at 18 (Aug. 1984). A report issued by the United States Department of Agriculture indicated that adoption of the California standards would probably also necessitate the adoption of component pricing in federal milk orders. *Id.* at 18-20. Such component pricing would be needed to equalize raw product costs among fluid milk processors who receive milk with differing solids-not-fat content. *Id.* at 18-19.

2. The Economic Relationship Between Milk Pricing and Fluid Milk Content

Basic economic principles also connect California's pricing and pooling laws to perpetuation of the milk composition standards. California milk composition standards result in fluid milk products that have more nutrients than federal standard milk. The addition to fluid milk of solids-not-fat, which provides these nutrients, increases processor costs, which are usually passed on to consumers. Increases in raw product costs through higher Class 1 minimum prices may also be borne by consumers. At some point, the increased cost of fluid milk will reduce the amount of milk consumed, and the nutritional benefit of higher standards will be undercut. If California cannot control raw product costs through minimum Class 1 prices, it will be unable to ensure that consumers receive the benefits of California's higher milk composition requirements at reasonable prices.

The threat to the composition standards from rising prices is not just theoretical. In the late 1990s, California retail milk prices were reportedly among the highest in the country. A serious, and ultimately unsuccessful, effort was made to allow the sale of federal standard milk in California as a remedy to high milk prices. Geoffrey Adalian, *Solving California's Milk Crisis*, 11 San Joaquin Agric. L. Rev. 87 (2001). If that effort had been successful, it would have effectively eliminated California's more stringent standards.

3. Judicial and Legislative Declarations of the Relationship Between Milk Pricing and Fluid Milk Content

The California courts and Legislature have also recognized the connection between milk pricing and milk composition. According to the courts, the primary purpose of the milk pricing laws is to provide "an adequate and continuous supply of pure, fresh, wholesome fluid milk to the consumers at fair and reasonable prices." *Golden Cheese Co. v. Voss*, 230 Cal. App. 3d 547, 553 (1991). The California Legislature has declared that economic disruption caused by the lack of pricing regulation "may tend to undermine sanitary regulations and standards of content and purity" for fluid milk. Cal. Food & Agric. Code § 61802(c). In setting minimum milk prices, the California Department of Food and Agriculture must consider whether those prices will "insure an adequate and continuous supply, in relation to demand, of pure, fresh, wholesome market milk . . . at prices to consumers which . . . are fair and reasonable." Cal. Food & Agric. Code § 62062(b).

Thus, well before the enactment of Section 7254, the California Legislature recognized the connection between price regulation and the content of fluid milk. The Court has long accepted the validity of such state legislative declarations in determining the purpose of state law. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 216 (1983).

4. California Pooling Laws and California Pricing Laws Are Integrally Related

California's milk pooling laws are an essential part of the milk pricing system. In the 1960s, the income of

producers who delivered to Class 1 plants greatly exceeded the income of similarly situated producers who shipped to plants that did not have high Class 1 utilization. *Hillside* Dkt. No. 151, Ex. A to Lombardo Decl., L.J. Butler, *Maintaining the Competitive Edge in California's Dairy Industry, Part I – Organization and Structure*, at 29. Processors began to acquire their own dairy herds and use the milk in their own Class 1 plants, which lowered their costs and displaced independent producers from Class 1 usage. *Id.* Processors also engaged in a variety of questionable practices that had the effect of undercutting the minimum price received by producers. *Id.* at 28. By removing the economic incentive to sell to Class 1 processors, California's pooling laws eliminated these abuses and allowed the minimum price system to function more efficiently.

Legislative declarations that accompanied enactment of the Gonsalves Milk Pooling Act show the relationship among pooling, pricing and milk content. In 1967, the California Legislature declared that "fluid milk and fluid cream are necessary articles of food for human consumption," that "the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content . . . is vital to public health and welfare," and that "unfair, unjust, destructive and demoralizing trade practices have appeared within this industry and these practices constitute a menace to the health and welfare of the inhabitants of this state by threatening the stability of this industry and by thereby endangering the assurance to the people of the State of California of the maintenance of an adequate supply of this necessary commodity. . . ." Cal. Food & Agric. Code § 62701.

These legislative declarations are similar to the declarations of legislative purpose for California's milk

pricing laws. Cal. Food & Agric. Code § 61802(b). As with these declarations, the declarations in the milk pooling laws connect the need for a milk pooling system with the need for "an adequate supply of healthful milk of proper chemical and physical content." Cal. Food & Agric. Code § 62701.

5. The 1997 Amendments to the California Pooling Plan

The California milk pooling system is a complex, integrated system. Its accounting procedures match the minimum prices (based on end use) that California processors are required to pay for milk, and the minimum prices (quota or overbase) that California producers are entitled to receive for milk. These procedures are designed to ensure the efficient operation of California's minimum milk pricing laws, especially Class 1 pricing.

As with any complex system, California's pooling laws require periodic adjustments to maintain their continued effectiveness in ensuring adequate supplies of fluid milk. The California pooling laws, as initially adopted, removed the economic incentive for producers to send their milk to Class 1 plants. The Department has, at various times, amended the pooling plan to include measures such as transportation allowances which ensure that adequate milk supplies will be shipped to Class 1 fluid milk processors. C.A. E.R. Tab 11Q at 11-12.

The 1997 pooling plan amendments at issue in this case are another necessary adjustment to the pooling plan. The pooling plan accounts for the purchase of out-of-state milk in determining a processor's pool obligations. In the mid-1990s, Class 1 prices were significantly greater than quota prices; and California's Class 1 prices were higher

than the equivalent minimum prices in neighboring states. *Id.* at 47-49, A-9. Under the then-existing accounting system, the disparity between the quota price and Class 1 price created strong economic incentives for California Class 1 processors to purchase out-of-state milk. Both price disparities led to the abusive practice known as "roundtripping," in which California-produced raw milk was shipped to Arizona and Nevada processors and an identical amount of raw milk produced in those states was shipped to California processors. C.A. S.E.R. Tabs 2C, 2I. The Chief Executive Officer of the Hillside Plaintiff's cooperative conceded that roundtripping was "patently threatening the California pooling system." C.A. S.E.R. Tab 2J at 168:23-25.

In 1997, the Department determined, after extensive public hearings, that the existing accounting method for out-of-state milk "ha[d] caused dramatic increases in the inefficient movement of milk and has altered the sound, orderly marketing practices of milk, all as a result of regulatory provisions and not competitive market conditions." C.A. E.R. Tab 11Q at 48. Selecting the most equitable and least restrictive approach available, the Department amended the pooling plan to require that Class 1 processors account for out-of-state milk in a typical month at the quota price, the highest minimum price available to California producers. Pooling Plan § 900(d). J.A. 47-48. This corrective measure was necessary to ensure the continued, efficient operation of California milk pricing and pooling laws. As the California Legislature has recognized, those laws ensure an adequate supply of fluid milk that satisfies state standards of content. Cal. Food & Agric. Code §§ 61802(c), 62701.

C. Even with a Dormant Commerce Clause Exemption, California is Constrained from Improperly Using Its Milk Pricing and Pooling Laws to the Detriment of Out-of-State Producers

An exemption from dormant Commerce Clause review for provisions of its milk pricing and pooling laws will not result in California applying those laws in a manner that is unfair to out-of-state milk producers. Congress retains its Commerce Clause power to eliminate the exemption in Section 7254 and end any abusive action by California.

Milk regulation, including California's milk pricing laws, is an area of active congressional involvement. In the 1990 Farm Bill, for example, Congress enacted section 102, which directed California and other states in setting the manufacturing allowance, a variable used in calculating minimum prices for milk processed into cheese, nonfat powdered milk, and butter. 7 U.S.C. § 1446e-1 (repealed 1996); Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359. Section 7255 of the 1996 Farm Bill modified this provision by specifying a maximum manufacturing allowance. 7 U.S.C. § 7255; Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888.

Petitioners cite enactment of that section and 7 U.S.C. § 7253 (Section 7253) in the 1996 Farm Bill in support of their argument that Section 7254 does not apply to California's pricing and pooling laws. Section 7253(a)(2) provided California producers a limited opportunity to participate in the federal milk marketing order system, as part of a more general reform of that system. Congress addressed, in detail, the United States Department of Agriculture's responses to Section 7253 in the Consolidated Appropriations Act of 2000 without any mention of

the California milk pricing and pooling laws. Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, App. H-HR3428, 113 Stat. 1501A-517 (1999). Rather than show that Section 7254 does not apply to pricing and pooling, the enactment of Sections 7253 and 7255 in the 1996 Farm Bill, and other related congressional action, show more strongly a substantial congressional involvement in milk price regulation. It is reasonable to assume that Congress would quickly respond to any undue burden on interstate commerce imposed by California.

Perhaps the most significant practical limitation on California's milk pricing and pooling laws are the competing intrastate interests involved in the implementation of these laws. California milk producers have an interest in higher raw milk prices. California fluid milk processors have a clear, countervailing economic interest in keeping raw product costs as low as possible. These processors will strenuously resist any attempt to curtail delivery of out-of-state milk to their plants at competitive prices. Before it amends its minimum pricing and pooling plans, the Department must hold public hearings at which all interests, including out-of-state producers, may present their views. Cal. Food & Agric. Code §§ 61896, 61991, 61993, 62031, 62705, 62717. As it did when it adopted the 1997 pooling plan amendments, the Department provides a detailed discussion of all contested issues, including the concerns of out-of-state interests, and an explanation of its final determination.

A common theme in dormant Commerce Clause decisions is the perceived need to protect unrepresented out-of-state interests. 1 L. Tribe, American Constitutional Law § 6-5, at 1051-52 (3d ed. 2000). The competing interests of California producers and processors and the use of

a public hearing process and reasoned decisionmaking significantly lessen that concern with regard to California's milk pricing and pooling laws.

III. BECAUSE CALIFORNIA MILK POOLING LAWS DO NOT DISCRIMINATE BASED ON RESIDENCY, PETITIONERS CANNOT STATE A CLAIM UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE

The Privileges and Immunities Clause prevents a state from imposing discriminatory laws on nonresidents, by providing that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const, Art. IV, § 2. Petitioners alleged in their complaints that the 1997 milk pooling plan amendments and all of California's milk pooling laws violate the Privileges and Immunities Clause by, among other things, requiring payment to the pool by California processors for milk purchased from outside of California, by denying out-of-state milk producers the right to purchase quota, and by denying out-of-state milk producers "the ability to conduct business in California under substantially the same terms as California producers." C.A. E.R. Tab 3, at 12:17-25.

California milk pooling laws regulate solely based on the location in California of milk production and processing; they do not, on their face, discriminate based on residency or citizenship. Primarily for that reason, the court of appeals upheld the district court's dismissal of

Petitioners' Privileges and Immunities Clause claim.[9] Appendix to Petition for Writ of Certiorari (Pet. App.) A13-A14. Petitioners do not dispute that the alleged discrimination is based on location of milk production, not on residency. Pet. Br. 42-43. Rather, they argue that the court of appeals erred by failing to consider the practical effect of the California laws on out-of-state dairies.

A. The Privileges and Immunities Clause Only Applies to State Laws that Discriminate Based on Residency

It is well-established that the Privileges and Immunities Clause is violated only if a state law discriminates against nonresidents, depriving them of a protected privilege that is accorded to residents. *New Hampshire v. Piper*, 470 U.S. 274, 284 (1985); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65 (1988). Even if a law discriminates based on residency, it will be upheld if there is a substantial reason for the discrimination and the discrimination against nonresidents is substantially related to the State's objective. *Piper*, 470 U.S. at 284.

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[9] All of the Petitioners initially alleged claims under the Privileges and Immunities Clause. The claims of all but one of the Petitioners, Darrel and Diane Kuiper, were dismissed because they are corporations and partnerships and therefore lack standing to bring the claim. *Western and S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656 (1981) (the Privileges and Immunities Clause does not apply to corporations); *see also, W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486, 492-93 (7th Cir. 1994) (unincorporated association is not "citizen" within meaning of the clause). Petitioners do not challenge the dismissal of the corporate petitioners' claims. Pet. Br. 2, n.4.

The limited scope of the Privileges and Immunities Clause arises from its history and structure. The Privileges and Immunities Clause carried over a similar provision in the Articles of Confederation. *Zobel v. Williams*, 457 U.S. 55, 79 (1982) (O'Connor, J., concurring). Both provisions arose out of the same need to "fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). The Founding Fathers understood that, to form one nation, states could not discriminate against citizens of other states. A strong union could only be formed if nonresidents entering a state were accorded all the rights of the state's citizens with regard to such fundamental rights as travel and engaging in a trade. George F. Carpinello, *State Protective Legislation and Nonresident Corporations: the Privileges and Immunities Clause as a Treaty of Nondiscrimination*, 73 Iowa L. Rev. 351, 365-66 (1988).

To carry out this purpose, the Privileges and Immunities Clause requires that a state "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. 168, 180 (1868); *see also Toomer v. Witsell*, 334 U.S. 385, 395-96 (1948). Thus, the Clause guarantees that, when a nonresident enters a state, he will be permitted to do business on the same basis as the citizens of that state. It does not require that a state provide a nonresident with all of the privileges that they were afforded in their state of citizenship. *Paul*, 75 U.S. at 180-81.

The Privileges and Immunities Clause is also inapplicable to laws regulating the movement of goods across state lines; those laws are subject to the dormant Commerce Clause. "At the most elementary level, the primary

concern of the commerce clause is business that involves more than one state, whereas the core concern of the interstate privileges and immunities clause is the treatment received within a state by the citizens of other states." Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 499 (1981). Thus, the Clause has only been applied to laws that discriminate based on residency. *See, e.g., Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64-65 (1988); *United Bldg. & Constr. Trades Council*, 465 U.S. 208, 216; *Austin v. New Hampshire*, 420 U.S. 656, 660 (1974); *Toomer*, 334 U.S. at 396.

Finally, the Privileges and Immunities Clause does not apply to laws, such as California's milk pooling laws, that classify based on location of production. States have broad powers to regulate products produced in-state, as long as the regulations do not unduly burden interstate commerce. In particular, states may regulate milk production. *See Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937). These laws may be subject to dormant Commerce Clause challenges, but are not subject to scrutiny under the Privileges and Immunities Clause.

B. Petitioners Improperly Attempt to Extend the Scope of the Privileges and Immunities Clause through the Application of the "Practical Effects" Test

Recognizing that the California milk pooling laws do not facially discriminate based on residency, Petitioners argue that this Court should adopt a "practical effects" test as part of its Privileges and Immunities Clause analysis. In so doing, Petitioners contend that "this Court's application of the Privileges and Immunities Clause has consistently involved an examination of the practical

effects of state laws and regulations when a State's discrimination against out-of-state residents is not expressed on the face of those laws." Pet. Br. 45. Contrary to Petitioners' argument, however, the "practical effects" test is not used to determine whether a law violates the Privileges and Immunities Clause, unless the law discriminates based on residency.

Petitioners' argument depends heavily upon a 1919 decision, *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522 (1919). Other than *Chalker*, all of the cases relied upon by Petitioners involved laws that facially discriminated between residents and nonresidents. *Austin v. New Hampshire*, 420 U.S. 656, 660-61 (1975) involved a challenge to a New Hampshire income tax laws that provided different exemptions to residents and non-residents. *Shaffer v. Carter*, 252 U.S. 37, 56-57 (1920) and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 73-74 (1920) involved challenges to state income tax laws that taxed different sources of income for residents and nonresidents and provided residents and nonresidents with different deductions.

In *Chalker*, this Court considered a challenge to a Tennessee tax that imposed an annual tax of $100 on each "foreign construction company" whose chief office was located outside the state. 249 U.S. at 525-26. Domestic construction companies and foreign construction companies that had their chief offices in the state were taxed only $25 per year. *Id.* at 526. The Tennessee Supreme Court had interpreted this law as imposing the $100 tax on any construction company having its chief office outside the state, regardless of whether the company was a citizen of that state. *Id.*

The Court held that the tax in *Chalker* violated the Privileges and Immunities clause. The Court explained

that they could "find no adequate basis for taxing individuals according to the location of their chief offices," and reasoned that because "the chief office of an individual is commonly in the state of which he is a citizen," this law "practically" discriminated based on residency. *Id.* at 527. Furthermore, "[u]nder the Federal Constitution a citizen of one State is guaranteed the right to enjoy in all other States equality of commercial privileges with their citizens; but he cannot have his chief office in every one of them." *Id.* This "arbitrary and unreasonable" law violated the Constitution. *Id.*

Although the Court in *Chalker* referred to how the law operated "practically," the case did not hold that the practical effect of a law must be assessed to determine whether the law discriminates based on residency in violation of the Privileges and Immunities Clause. Rather, the Court had to look beyond the face of the statute to determine whether the tax discriminated against out-of-state citizens because there was no plausible basis offered for the statutory classification. The Court recognized that the classification was merely pretextual and the law was intended to impose higher taxes on nonresidents.

Chalker is distinguishable from the instant case. The California milk pooling laws do not discriminate based on residence. Instead, they set minimum prices to be paid to producers and create a revenue pool for milk produced and processed within California. This classification reflects California's legitimate efforts to regulate milk produced and processed in-state, without requiring a minimum price for out-of-state production. Thus, unlike *Chalker*, there is a plausible basis for the statutory classification scheme and the laws are not pretextual.

The Court has rarely cited *Chalker* for any proposition in the more than eighty years since it was decided.

Chalker has not given rise during that time to the application of a "practical effects" test under the Privileges and Immunities Clause. The Court has continued to apply the Privileges and Immunities Clause solely to laws that classify based on residency. *See, e.g., Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65 (1988); *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 216 (1984); *Austin v. New Hampshire*, 420 U.S. 656, 660 (1974); *Toomer v. Witsell*, 334 U.S. 385, 395-96 (1948).

C. The "Practical Effects" Test Developed in Dormant Commerce Clause Decisions Should Not Be Transplanted to the Privileges and Immunities Clause

The California milk pricing and pooling laws burden California milk producers by denying them the competitive advantage of being able to sell milk in California at below minimum prices. The laws benefit these producers by guaranteeing them a minimum price for milk.

Petitioners appear to argue that limiting the benefits (but not the burdens) of these laws to milk produced in California violates the Privileges and Immunities Clause. Petitioners cite no decisions in which laws that regulate based on location of production were found to violate the Privileges and Immunities Clause. Rather, they seek to transplant the practical effects test used in dormant Commerce Clause cases into the Privileges and Immunities Clause. This effort to treat the Privileges and Immunities Clause as equivalent to the dormant Commerce Clause is inappropriate.

Although the Privileges and Immunities Clause and the Commerce Clause have a common origin and a "shared

vision of federalism," *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978), their focuses are quite different. As stated in *United Bldg. and Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 220 (1984):

> The two Clauses have different aims and set different standards for state conduct. The Commerce Clause acts as an implied restraint upon state regulatory powers. Such powers must give way before the superior authority of Congress to legislate on (or leave unregulated) matters involving interstate commerce. . . . The Privileges and Immunities Clause, on the other hand, imposes a direct restraint on state action in the interests of interstate harmony. . . . It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce.

Thus, the Privileges and Immunities Clause focuses on comity, not commerce.

The dormant Commerce Clause protects against economic protectionism by prohibiting state laws that are "designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988). "State laws discriminating against interstate commerce on their face are 'virtually *per se* invalid'" *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996). Even laws that are evenhanded may nevertheless violate the dormant Commerce Clause if they unduly burden interstate commerce. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 583 (1986) (fact that law regulates evenhandedly "is irrelevant if the 'practical effect' of the law is to control liquor prices in other states"); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945) (evenhanded

regulation of train lengths violates the Commerce Clause if the practical effect of such regulation is to control train operations beyond the boundaries of the state). The practical effects test is used to make the often difficult determination of an undue burden on interstate commerce.

Another significant difference between the dormant Commerce Clause and the Privileges and Immunities Clause involves the power of Congress. Congress cannot exempt states from the constraints of the Privileges and Immunities Clause, which it can do under the dormant Commerce Clause. *See Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 655-56 (1981) (Commerce Clause exemption does not exempt law from scrutiny under Privileges and Immunities Clause). Expanding the scope of the Privileges and Immunities Clause would limit Congress's ability to adapt to changing needs by allowing states to regulate specific areas of interstate commerce. Similarly, if Congress disagreed with the balance struck by the courts in determining the practical effect of a state law under the Privileges and Immunities Clause, it would be unable to adjust that balance. These constraints are especially salient in the context of interstate commerce where Congress has express constitutional power.

D. Applying a Discriminatory Intent Test in Privileges and Immunities Clause Cases as Suggested by the Solicitor General Would Be Improper

The Solicitor General agrees that the "practical effects" test proffered by Petitioners is inappropriate in the context of a Privileges and Immunities Clause claim. U.S. Br. 24-29. The Solicitor General then suggests that the Court consider drawing upon its Equal Protection Clause

decisions, and find that a facially neutral state law that has a discriminatory intent could violate the Privileges and Immunities Clause. The Solicitor General seems to recognize that this suggestion would alter the current scope of the Privileges and Immunities Clause. U.S. Br. 25-26. The Solicitor General also recognizes the great difficulty that Petitioners would have in this case showing a discriminatory intent. U.S. Br. 27-28 n.8.

The central purpose of the Equal Protection Clause is to eliminate racial discrimination. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996). Many of the laws challenged under the Equal Protection Clause are facially neutral, and the invidious nature of the law, as applied to a suspect classification, is only apparent through its effect. But even if such an effect exists, the law violates the Equal Protection Clause only if it has a discriminatory intent or purpose. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976).

The Privileges and Immunities Clause merely requires the state to provide nonresidents with the same rights that are accorded to residents. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). It does not address laws that have a disparate impact on nonresidents. Using the rational basis test, the court of appeals determined that the Petitioners had not shown that California milk pooling laws violate the Equal Protection Clause. Pet. App. A10-A13. There is no basis for requiring a more stringent Equal Protection Clause review indirectly through the Privileges and Immunities Clause. In any case, California's milk pricing and pooling laws were adopted without

any discriminatory intent for the purpose of regulating milk produced and processed in-state.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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Respectfully submitted,

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